Supreme Court, U.S.
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NO. 92-1350

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE GEORGE L. PARKER,
Petitioner,

v.

GILBERT S. MERRITT,
CHIEF JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAMON J. KEITH,
CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT, AND

PIERCE LIVELY,
SENIOR CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT,
Respondents.

BRIEF IN OPPOSITION TO GEORGE L. PARKER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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Statement of the Case

John Demjanjuk was extradited to Israel on February 27, 1987. He was convicted there in 1988 for crimes committed by "Ivan the Terrible", the ruthless Nazi guard of the Treblinka gas chambers during World War II. The Israeli Court sentenced Mr. Demjanjuk to death; he is currently in Israel in solitary confinement under 24 hour surveillance awaiting a final determination by the Israeli Supreme Court.

In 1985, the United States Court of Appeals for the Sixth Circuit had upheld the extradition of Mr. Demjanjuk by declining to issue a writ of habeas corpus to stop the process. 776 F.2d 571 (6th Cir. 1985). On June 5, 1992, the Sixth Circuit, sua sponte, issued an order beginning an inquiry to determine whether Demjanjuk's extradition may have been based on erroneous information. The June 5 order asked, inter alia, for a brief from the United States describing all information in the government's possession tending to show Demjanjuk was not "Ivan the Terrible." A second order issued on June 18 asked the parties to brief relevant international law issues, "in light of possible new evidence that Demjanjuk is not 'Ivan the Terrible'."

On August 17, after briefing and oral argument pursuant to the orders of June 5 and June 18, the Sixth Circuit panel issued a third order. The order of August 17 recounted the motivation for the court's reopening of the case:

> [T]he court's inquiry concerns whether lawyers from the Department of Justice engaged in prosecutorial misconduct by concealing or withholding from the district court and this court evidence in their possession that John Demjanjuk was not the notorious

> Ukrainian guard known as 'Ivan the Terrible' who operated the gas chambers at the Treblinka, Poland death camp. The 'bedrock question' for the court ... is whether the failure of the attorneys to disclose such exculpatory information constituted fraud upon the court that mislead this court into allowing Demjanjuk to be extradited.

In order to procure information the Sixth Circuit panel deemed "essential" for reaching a decision on the issue of fraud, the court appointed Judge Thomas Wiseman of the Middle District of Tennessee as Special Master to conduct hearings and report back to the Sixth Circuit.

Petitioner George Parker was called as a witness in the Special Master proceedings; he took the stand before Judge Wiseman on November 12, 1992. His testimony is a matter of public record. Petitioner Parker was one of the lead attorneys during the initial Demjanjuk denaturalization investigation at the Justice Department's Office of Special Investigations (OSI)--the Nazi hunting office of the Department. Mr. Parker swore under oath that he had had serious doubts at the time the investigation against Mr. Demjanjuk was proceeding in 1979-1980 that Mr. Demjanjuk was in fact "Ivan the Terrible". Petitioner Parker testified extensively about a five page single-spaced memorandum that he had written to the Director and Deputy Director of OSI, outlining his doubts about the case. Petitioner Parker testified that by pursuing the Treblinka charges, he believed that the Department was skirting the ethical obligations which should bind government lawyers in this cas. Petitioner Parker testified that he later left his position as a government

attorney in part because of the way the Demjanjuk investigation had been carried out.

Having testified that he believed that John Demjanjuk was not Ivan the Terrible of Treblinka, petitioner Parker now asks this Court for a writ of mandamus or prohibition to stop the hearings being conducted by the Sixth Circuit with the assistance of Judge Wiseman as special master.

Summary of Argument

George Parker lacks the standing necessary to petition this Court for an extraordinary writ. A basic requirement of standing is that the party claiming standing must be aggrieved by a prospective judgement. Petitioner Parker is--by his own admission--not a party to this dispute; he is a non-party witness. A judgement against the government will have no adverse legal impact for Petitioner Parker. It is only in the most unusual circumstances that a non-party witness may make procedural challenges to a proceeding. Having declined to suffer a contempt citation in order to challenge the jurisdiction of the Special Master, Parker now lacks standing to challenge the Sixth Circuit's procedures.

The use of the extraordinary writ of mandamus would be inappropriate in this case. Mandamus should not issue where there is another adequate remedy available. If petitioner Parker has the standing he claims (but which respondent does not concede) then the avenue of appeal is available after an adverse judgement by the Sixth Circuit. Moreover, mandamus may not be

used to challenge a Court's actions in the exercise of its proper jurisdiction. Only when a court has refused to act, or has acted completely outside of its jurisdiction may a superior court issue a writ of mandamus. In this instance, the Sixth Circuit has acted. An investigation of fraud on the court is clearly within the Sixth Circuit's jurisdiction. Thus, mandamus is inappropriate. The writ may not be used to dictate the manner of a judge's action. The case of La Buy v. Howes Leather Co., 352 U.S. 249 (1957) is inapposite. The inquiry by the Special Master in this instance is being conducted by a sitting federal judge and the inquiry is not a trial. These facts distinguish the current case from La Buy.

This case is moot with regard to petitioner Parker. Petitioner Parker has testified under oath in open court. Parker asserts that he may suffer reputational injury from a finding by the Sixth Circuit, based in part on his testimony. Having testified, Parker may not now complain of the process by which his testimony was procured. Speculative reputational harm or professional injury are not adequate to make ripe for decision an otherwise moot case.

Finally, the equities of this case militate against the issuance of an extraordinary writ to stop the Special Master proceeding. Mandamus is governed by equitable principles. The Sixth Circuit is attempting to determine whether Justice Department attorneys conducted a fraud on the court in order to procure the extradition of John Demjanjuk. The former government attorney who has stated under oath that he believed that John

Demjanjuk was not "Ivan the Terrible," the offense for which Demjanjuk was extradited, now asks for a halt in the proceedings designed to determine whether judicial approval of the extradition was erroneous. Mandamus should be withheld where the equities do not favor the issuance of the writ.

Argument

I. Petitioner Parker lacks standing to challenge the procedures by which the Sixth Circuit has chosen to investigate fraud on the court.

George Parker has petitioned the Court for a writ of prohibition or mandamus to halt the Sixth Circuit's Special Master proceeding because "his individual rights may be violated or denied." Petition at 13. By his own admission Parker is not a party to the ongoing dispute between John Demjanjuk and the United States Government. Petition at 17. His only role is as a witness called to testify about the procedures in the Office of Special Investigations and his own actions during the denaturalization proceedings against John Demjanjuk over a decade ago. Parker has no standing to challenge the Sixth Circuit's method of conducting this investigation. A basic requirement for standing is that a party claiming standing must be aggrieved by the prospective judgment. The crux of the dispute in this case is whether judicial approval under 18 U.S.C. § 3184 for Mr. Demjanjuk's extradition to Israel was improperly procured by the Justice Department. An adverse finding against the government would have no legal impact for Mr. Parker.

At an irreducible minimum, article III requires that the party who invokes the court's authority show that he personally has suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant, and that the injury can fairly be traced to the challenged action and is likely to be redressed by a favorable decision. Bender v. Williamsport Area School Dist., 475 U.S. 534, 542 (1986), Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). Beyond the constitutional requirements, the Court has expressed a prudential concern that the plaintiff's stake in the outcome be adequate to assure "the concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult ... questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Because Parker does not suffer from any redressable injury from the prospective judgment of the Sixth Circuit, and because his stake in the outcome is tangential at best, this Court should deny the requested writ for lack of standing.

A finding that Petitioner Parker has standing to make a procedural challenge in a court proceeding in which his only role is as a nonparty witness would set a remarkable precedent. This Court has in the past severely constrained the rights of nonparty witnesses to challenge court proceedings. A nonparty witness is not permitted to make objections of incompetency or irrelevancy, "for this is no concern of his." Blair v. United States, 250 U.S. 273, 282 (1919). "[I]t is in the ordinary case no concern of one summoned as a witness whether the offense is within the

jurisdiction of the court or not." Id. The Court has limited nonparty witnesses' rights to a jurisdictional challenge via the appeal of a contempt citation for refusal to testify. United States Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988). Except in the unique circumstance of a contempt citation, a nonparty witness may not obtain appellate review of a court's order requiring testimony or production of documents. See United States v. Ryan, 402 U.S. 530, 532 (1971)("If... the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him."). In Alexander v. United States, 201 U.S. 117 (1906) the Circuit Court for the Eastern District of Wisconsin had issued orders that a number of witnesses appear before a "special examiner" to answer questions and produce requested documents. The subpoenaed witnesses appeared but refused to answer certain questions or permit the use of certain papers "on the ground of this action being the immateriality and irrelevancy of the evidence sought to be adduced." The Circuit Court ordered the witnesses to answer the questions and the nonparties appealed to this Court. This Court held that the only means of review for the nonparty witness was to refuse to testify and then challenge the contempt order:

> [A]n order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as orders under review, but from such a ruling it is not contended there is an appeal. Let the court go further, and punish the witness for contempt of its order, --then arrives the right of review...."

Id. at 121. Petitioner Parker could have challenged the jurisdiction of the Sixth Circuit by refusing to testify and by being held in contempt. To his credit, Parker did not choose that route. But appeal through contempt is the only method by which a nonparty witness may challenge the order of a court.

Moreover, it is important to distinguish between a rule-based challenge and a jurisdictional challenge to a court's authority. Nowhere in his petition does Parker question the jurisdiction of the Sixth Circuit to investigate fraud on the court. Rather, Parker questions the procedure used by the Sixth Circuit to conduct the investigation.[1] The Supreme Court in Catholic Conference made clear that a non-jurisdictional attack on court procedures by a nonparty would not be tolerated even through a contempt citation:

> We are not confronted here with a non-party witness attempting to challenge its civil contempt by raising matters in which it has no legitimate interest, for instance the District Court's lack of personal jurisdiction over the parties or a limitations statute that would compel dismissal of the action. As to such matters, even if it were ultimately determined that the court should not have allowed the suit to proceed, the order or process it issued in the conduct of the litigation would still be valid.

Catholic Conference, 487 U.S. at 76-77. Because Parker is a nonparty witness who will not be aggrieved by an adverse judgment of the Sixth Circuit, and because he attacks procedures and not

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[1] See Petition at 72 (asking that the cause be remanded to the Sixth Circuit "for its consideration of a more appropriate course of action consistent with the requirements of Fed. R. Civ. P. 53").

the jurisdiction of that Court, he lacks standing to petition for a writ of mandamus.

II. It would be an improper use of the extraordinary writ of mandamus for this Court to stay the Sixth Circuit's investigation of fraud on the court.

a. If Petitioner has standing to obtain an extraordinary writ, then he also has standing to appeal from an adverse finding, and therefore there exists an adequate remedy at law.

Petitioner Parker may not obtain review of the Sixth Circuit's investigation of fraud on the Court via a mandamus petition.[1] Mandamus is resorted to where appeal is clearly inadequate and the writ is reserved for truly extraordinary causes. These prohibitions are particularly relevant where mandamus is requested against a judge. Ex Parte Fahey, 332 U.S. 258, 259-60 (1947). Petitioner Parker claims that he has no other adequate remedy available to challenge the appointment of the Special Master, bemoaning the United States' reluctance to take immediate action. Petition at 22-23.[2] But if Petitioner Parker has standing to obtain a writ of mandamus, as he claims, see Petition pp. 17-21, then he would also have standing to obtain review through appeal after the final determination by the Sixth Circuit.[3]

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[2] "[T]he government has deferred seeking review of the panel's interim order appointing a special master until the panel reaches a final decision in this case...." Respondent's [The United States'] Reply Brief to George Parker's and Norman Moscowitz' suggestions for rehearing en banc, reprinted in Petition at A-138.

[3] If injured in a fashion adequate to support standing, Petitioner Parker would be able to intervene after final judgment and seek to appeal the Sixth Circuit's findings. See e.g., United

While Mr. Demjanjuk does not concede that Petitioner Parker has standing to challenge actions by the Sixth Circuit (see Part I, supra), taken on its own terms Petitioner's argument is internally inconsistent. In order to establish the standing necessary to obtain an extraordinary writ, Parker makes reference to cases granting nonparties the right to appeal. If petitioner Parker does have the nonparty standing he claims, then like the government, he may assail the procedures used by the Sixth Circuit after a final decision.

No writ may be granted where there is an adequate remedy through the appellate process. See Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296, 309 (1989) ("[P]etitioners must show that they lack alternative means to obtain the relief they seek, and carry the burden of showing that their right to issuance of the writ is clear and indisputable.")(citations omitted); Will v. United States, 389 U.S. 90, 96 (1967)(mandamus may never be employed as a substitute for appeal); Marbury v. Madison, 1 Cranch 137, 169 (1803)("Still, to render the mandamus a proper remedy ... the person applying for it must be without any other specific and legal remedy.") Because, if Petitioner Parker has the standing he claims, he would also be able to appeal a final judgment, a mandamus action before final judgment is improper.

Airlines, Inc. v. McDonald, 432 U.S. 385 (1977)(permitting post-judgment intervention by nonparty for purpose of appeal).

b. Petitioner alleges no actions by the Sixth Circuit which would justify the issuance of an extraordinary writ of mandamus

Beyond the fact that Petitioner Parker--if he has any standing at all--must wait for a proper appeal, the principles of mandamus do not permit the issuance of a writ under the facts alleged in the petition. The Sixth Circuit has not declined to exercise its jurisdiction; nor does Parker allege that the Court has exceeded its jurisdiction in appointing a Special Master. Rather, petitioner Parker complains of a decision made by the Sixth Circuit in the exercise of its jurisdiction. See Petition at 15 (complaining of the Sixth Circuit's failure to make findings of exceptional circumstances necessitating the appointment of a special master); petition at 52 (asking that the writ be issued so that the Sixth Circuit may consider a "more appropriate course of action").

A writ of mandamus may not be used to challenge a court's actions in the exercise of its proper jurisdiction. An inferior court may only be ordered through mandamus that it must exercise its jurisdiction, or be instructed that it has engaged in a usurpation of power. Mandamus may not be used to order a lower court to re-evaluate an abuse of discretion. Will v. United States, 389 U.S. 90, 104 (1967); See Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27 (1943)(refusing to issue writ where an inferior court "acted within its jurisdiction" even though the action taken may have been erroneous); Interstate Commerce Commission v. U.S. ex rel Campbell, 289 U.S. 385, 394 (1933)("If mandamus were to stand...the result would be to compel an

adjudication in a particular way. The rule is elementary that this is not the function of the writ. Mandamus is the appropriate remedy to compel a judicial officer to act. It may not be used as a substitute for an appeal or writ of error to dictate the manner of his action."); Ex Parte Perry, 102 U.S. 183, 186 (1880)("We cannot by mandamus correct the judicial errors committed by an inferior court in the progress of a cause. We can in this way, in a proper case, compel an inferior court to act, but cannot control its decisions while acting."); Ex Parte Sawyer, 88 U.S. 235, 238 (1874)("A superior court may by mandamus set the machinery of an inferior court in motion, but when that has been done, its power under that form of proceeding is at an end. The inferior court is supreme within its own jurisdiction, so long as it is acting."); Ex Parte Newman, 81 U.S. 152, 165 (1871)("[T]he only office of the writ [of mandamus] when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the supervisory court will never prescribe what decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.").

There is no valid argument that the Sixth Circuit's action constituted the "usurpation of power" necessary to justify mandamus. See Gulfstream Aerospace v. Mayacamas Corp., 485 U.S. 271, 289 (1988). Petitioner Parker is complaining only that the Sixth Circuit decided to engage in fact-finding by delegating the

task of taking evidence during an inquiry into fraud on the court to one federal judge rather than another. It is beyond dispute that the Sixth Circuit has the authority to inquire into the issue of fraud on the Court. Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). The challenged action by the Sixth Circuit is a wholly proper exercise of discretion, unreviewable by mandamus.

Petitioner Parker relies heavily on La Buy v. Howes Leather Co., 352 U.S. 249 (1957), a case where this Court affirmed the issuance of a writ of mandamus ordering a district judge to vacate a reference order to a non-judge special master under F.R.C.P. 53. La Buy was a hotly debated 5-4 opinion which is distinguishable on its facts and by subsequent decisions of the Court. In La Buy, the district judge had referred entire civil antitrust trials to a master on the basis that the district judge feared full trial proceedings would take too long, clogging his busy docket. In affirming the Circuit Court's mandamus order, this Court was concerned that the litigants had been denied their right to a trial by an article III judge for no "exceptional" reason. La Buy, 325 U.S. at 258.[4] The Circuit court that had

[4] Apparently the reference of cases to non-judge lawyers was of particular concern to the La Buy majority as it cited in a footnote a passage from a then current casebook on Judicial Administration:

> There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as a referee. Only a drastic administrative rule...will put to rout this inveterate enemy of dispatch in the trial of cases.

issued the mandamus order was aware of the district judge's propensity to abuse the special master process.

That there was no intent in the La Buy decision to permit interlocutory review via mandamus of all discretionary applications of the federal rules was subsequently made clear in Will v. United States, 389 U.S. 90, 96 (1967). In Will, this Court described La Buy as a case where the judge had displayed "a persistent disregard for the federal rules." Will, supra at 104 n.14. Finding no pattern of "deliberate disregard for the federal rules" in the record in Will, the Court declined to issue the requested writ:

> In La Buy, however, we specifically relied upon evidence in the record which showed a pattern of improper references of cases to special masters by the District Judge. There is no evidence in this record concerning petitioner's practice in other cases, aside from his own remark that the government is generally dissatisfied with it, and his statements do not reveal any intent to evade or disregard the rules.

Id. at 104-05. No such allegation has been made in Parker's petition. While the instant case involves the same rule (F.R.C.P. 53) as La Buy, Parker's petition is best analogized to the situation found in Will:

> Thus, the most that can be claimed on this record is that petitioner may have erred in ruling on matters within his discretion. See Parr v. United States, 351 U.S. 513, 520 (1956). But "[t]he extraordinary writs do not reach such cases; they may not be used to thwart the congressional policy against piecemeal appeals." Id., at 520-521. Mandamus, it must be remembered, does not run the gauntlet of reversible errors." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953). Its office is not to "control the decision of the trial court," but rather merely to

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La Buy, 352 U.S. at 253 n.5 (citation omitted).

> confine the lower court to the sphere of its discretionary power. Id. at 383. Thus, the record before us simply fails to demonstrate the necessity for the drastic remedy employed.

Will, 389 U.S. at 103-04 (parallel citations omitted).

Beyond the lack of a "pattern of disregard" for the rules, other facts distinguish La Buy from the instant case. La Buy involved the reference of an entire trial to a master. The master in La Buy was not an article III Judge. Other courts have agreed that a reference of an entire trial, or reference to a non-judge master is a clear abuse of discretion, to be cured through mandamus under La Buy. See e.g., In re Bituminous Coal Operators' Ass'n, inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991)(special master may not be appointed as a "surrogate judge" to try the controversy and determine liability); In re Armco, Inc., 770 F.2d 103, 105 (8th Cir. 1985)(district court erred in granting the master authority to preside at trial on the merits but reference for other purposes held proper); In re Watkins, 271 F.2d 771, 775 (5th Cir. 1959)(mandamus appropriate where reference to master "nullifies the right to an effective trial before a constitutional court"). Thus, to the extent that mandamus is used to guarantee a party the right to trial before a constitutionally appropriate fact-finder, La Buy is in keeping with Supreme Court precedent. See Thermatron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976)(mandamus appropriate to correct a clearly erroneous remand of case out of a federal forum); Dairy Queen v. Wood, 369 U.S. 469, 472 (1962)(mandamus appropriate to protect constitutional right to trial by jury);

Beacon Theatres, Inc v. Westover, 359 U.S. 500 (1959)(same). The Sixth Circuit referred the fact-finding duties in this case to a sitting federal Judge--Judge Wiseman of the Middle District of Tennessee. Judge Wiseman is anything but the "temporary substitute appointed on an ad hoc basis and ordinarily not experienced in judicial work" that the supreme Court had warned against as a fact-finder in La Buy. La Buy, 325 U.S. at 259. Moreover, the investigation taking place in Nashville is not a trial. It is an inquiry into prosecutorial misconduct during proceedings long past. Therefore, La Buy is inapplicable on its facts.

Moreover, to the extent that La Buy was a decision generally granting superior courts "supervisory control" over inferior courts though the use of mandamus, it is dubious precedent. In this regard, "La Buy is defunct. Although the Court has not yet erected the tombstone, it has ordered flowers." First National Bank of Waukesha v. Warren, 796 F.2d 999 (7th Cir. 1986)(opinion of J. Easterbrook). See also, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665-66 n.7 (1978)("Although in at least one instance we approved the issuance of the writ upon a mere showing of an abuse of discretion, La Buy v. Howes Leather Co., 352 U.S. 249, 257 (1957), we warned soon thereafter against the dangers of such a practice.")(plurality opinion)(citing Will v. United States).

Because the Sixth Circuit's action does not fit the requirements for a writ of mandamus under La Buy, and because the Sixth Circuit was exercising its sound discretion by appointing one federal judge rather than another to investigate fraud on the

Sixth Circuit court, no writ of mandamus should issue in this case.

III. With regard to Petitioner Parker, this case is moot.

Petitioner Parker alleges that the findings of Special Master Wiseman will "affect George L. Parker's reputation, his livelihood and his future in his chosen profession." Petition at 50. But Mr. Parker has already testified under oath before the Special Master. This testimony was widely covered in the national press.[5] He had also given interviews to the television media regarding his involvement in the Demjanjuk case prior to the case being reopened. See e.g., Nightline, (ABC television broadcast, December 23, 1991).

[5] A summary Westlaw search in the PAPERS library revealed more than 70 articles containing the words "Parker" and "Demjanjuk". See e.g. "And More on Mr. Demjanjuk", Washington Post, Nov. 15, 1992, at c06 (citing petitioner Parker's testimony before the Special Master and beginning with the words, "The revelations of gaps and shabby dealing in the John Demjanjuk case have now crossed the line from troubling to genuinely dreadful."); Eric Harrison, "Probe of Nazi War Criminal Case Raises Ethics Questions. Government: A former Justice Dept. attorney said he resigned over handling of possibly exculpatory evidence concerning the accused", Los Angeles Times, Nov. 13, 1992, at A4, Home Edition (citing petitioner Parker's testimony); "Justice Dept. Lawyer Reports He Voiced Doubt on Demjanjuk", Boston Globe, Nov. 13, 1992, at 12 (citing petitioner Parker's testimony); Joe Edwards, "Judge Told that Demjanjuk Wasn't 'Ivan' A Former Justice Lawyer Testified. He said the wrong man deported", Philadelphia Inquirer, Nov. 13, 1992, at A26. (citing petitioner Parker's testimony); "Demjanjuk Case Stirs New Doubt Ex-Prosecutor Says Fears Were Ignored"; San Jose Mercury News, Nov. 13, 1992, at 6E (citing petitioner Parker's testimony); "Ivan's Terrible Treatment the Issue: The John Demjanjuk Case--Our View: He should be returned to the U.S." Rocky Mountain News, Nov. 15, 1992, at 161 (citing petitioner Parker's testimony); "Attorney Testifies that Demjanjuk's Extradition was a Mistake", St. Paul Pioneer Press, Nov. 13, 1992, at 8A; Bill Sloat & Micelle Lesie, "Ivan Probe Prosecutor Testifies He Doubted, Then Quit", Cleveland Plain Dealer, Nov. 13, 1992, at 20A (referring to petitioner Parker).

Because petitioner Parker has testified and all of the evidence surrounding his involvement with the Demjanjuk case is now a matter of public record on file with the Special Master in Nashville, the petition is moot. "Mootness determinations are concerned in large part with the determination whether any effective purpose can still be served by a specific remedy." Wright & Miller, Federal Practice and Procedure §3533.1 (1984). Had Parker chosen to resist the subpoena compelling him to testify, his complaints about the procedures used by the Sixth Circuit would be ripe. But having testified, Parker cannot now complain about the process by which his testimony was procured.

In Office of Thrift Supervision v. Dobbs, 931 F.2d 956 (D.C.Cir. 1991), the OTS had issued a subpoena duces tecum requiring the production of certain documents and an appearance at a deposition. Citing numerous decisions of other courts, the D.C. Circuit dismissed an appeal challenging the subpoena on the ground that Dobbs had already complied and OTS had obtained his testimony. See id. at 957 and cases cited therein. As to Dobbs' complaint that he remained subject to the subpoena and could be called to testify again, the court found that "future speculative action that may never occur is insufficient to create a concrete present controversy." Id. at 958. See also, United States v. Kis, 658 F.2d 526, 532-33 (7th Cir. 1981), cert. denied sub. nom. Salkin v. U.S., 455 U.S. 1018 (1982)(appeal to prevent future use of compelled evidence dismissed as moot because such use would be highly speculative). Injuries which are too speculative do not

merit extraordinary relief. Whitehorse v. Ill. Central R. Co., 349 U.S. 366, 373 (1955).

Parker's complaints about the potential for future injury in his professional life on the basis of theoretical disciplinary action by a hypothetical body are also moot, because any such action is highly speculative.[6] There is no live controversy regarding petitioner Parker and the writ of mandamus should be denied.[7]

IV. The equities of this case favor a speedy resolution of this dispute and militate against the issuance of an extraordinary writ of mandamus.

While mandamus is available only in an action at law, it is governed by equitable principles. Stern v. South Cester Tube Co., 390 U.S. 606, 609 (1968). "[Mandamus] may be refused for reasons comparable to those which would lead a court in equity, in the exercise of its sound discretion, to withhold its protection of an undoubted legal right." United States v. Dern, 289 U.S. 352, 359 (1933). See also In re First Federal Sav. and Loan Ass'n of Durham, 860 F.2d 135, 140 (4th Cir. 1988)(court should not overlook principles of fairness when they are enmeshed in mandamus considerations); DeGaston v. Dillon, 247 F.Supp. 511 (1963) affirmed sub. nom Degaster v. Fowler, 354 F.2d 515 (D.C.

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[6] Moreover, it is presumed that Mr. Parker's rights will be adequately protected in any state disciplinary proceeding that may be brought against him. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[7] An apparent acceptable remedy to Mr. Parker -- remand to the district court judge who heard the denaturalization and extradition cases -- would not avoid the type of public inquiry that is now taking place before the Special Master and from which Mr. Parker requests relief.

Cir. 1955)(mandamus denied because plaintiff came into court with unclean hands).

Petitioner Parker has insisted that additional delay "will not prejudice any of the witnesses or parties" while there is the potential for "grave harm" to George L. Parker if the proceeding is allowed to continue. See George L. Parker's Motion to Stay Proceedings in Demjanjuk v. Petrovsky, (6th Cir. 1993)(No. 85-3435), at 4. Nothing could be further from the truth. Mr. Demjanjuk is currently in Israel locked in solitary confinement under a death sentence. It is ludicrous for a former employee of the United States government to claim that the potential for reputational injury merits further delay "so that the Sixth Circuit may reconsider its procedures" while John Demjanjuk's life quite literally may hang in the balance. A speedy determination by the Sixth Circuit could have great significance, legal and diplomatic, to the proceedings in that country.

Beyond the reality of Mr. Demjanjuk's incarceration in solitary confinement under 24-hour surveillance is a simple yet powerful principle: justice delayed is justice denied. For the past fifteen years John Demjanjuk and his family have lived under the accusation that Demjanjuk was "Ivan the Terrible"--one of the most sadistic and ruthless mass-murderers in human history. This was the offense for which Mr. Demjanjuk was extradited and for which the Rule of Specialty allowed him to be tried, convicted and sentenced to death in Israel.

A court should not act on a request for mandamus where the equities do not favor issuance of the writ. Petitioner Parker

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C

For the foregoing reas
Parker's petition for a writ

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Parker petitions the Court to issue a
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sound discretion and withhold the

Conclusion

asons, this Court should deny George
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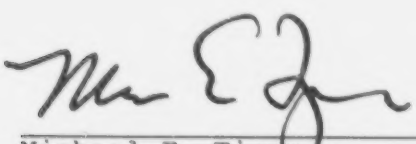
Respectfully submitted,



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